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# State v. Cruse Appellant's Brief Dckt. 44922

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	Supreme Court No. 44922
	)	
Plaintiff-Respondent,	)	
	)	
-vs-	)	
	)	
ROBERT DOUGLAS CRUSE	)	
	)	
	)	
Defendant-Appellant.	)	
	)	

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BRIEF OF DEFENDANT-APPELLANT

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APPEAL FROM THE DISTRICT COURT  
OF THE FOURTH JUDICIAL DISTRICT  
IN AND FOR VALLEY COUNTY

HONORABLE JASON D. SCOTT, DISTRICT JUDGE, PRESIDING

-----  
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## **STATEMENT OF THE CASE**

### **A. Nature of the Case.**

This is an appeal from the sentence meted out by the presiding judge pursuant to a Judgment of Conviction and Commitment whereby the defendant pled guilty to the charge of Lewd Conduct with a Minor Under Sixteen, in violation of I.C. § 18-1508. The court's refusal to reduce the sentence as requested by the defendant's motion under Rule 35 I.C.R. is also appealed.

### **B. Course of Proceedings Below.**

The defendant was arrested on July 3, 2016. A Complaint was filed and the defendant was arraigned by the Magistrate on July 5, 2016. The defendant waived his Preliminary Hearing on July 19, 2016, and was bound over to District Court.

The District Court Arraignment occurred August 1, 2016. At that time, the defendant stated his intention to plead guilty and to forego representation by legal counsel. The Court recommended that he reconsider his decision no represent himself and continued the Arraignment to August 15, 2016. At the continued arraignment the defendant appeared with counsel and requested further continuances before entering a plea. On October 3, 2016, the defendant entered a plea of Not Guilty and the matter was set for a Pretrial Conference on November 21, 2016 and a Jury Trial on December 6, 2016.

At the Pretrial Conference on November 21, 2016, the defendant entered a plea of guilty to the Information. He appeared before the Court for sentencing on January 23, 2017.

The Notice of Appeal was filed March 2, 2017. On April 13, 2017, the defendant filed his Rule 35 Motion. The Court issued its Order denying the motion the same day.

**C. Statement of Facts.**

The defendant admitted to engaging in manual to genital contact with his 7-year old step-granddaughter on approximately 4 or 5 different occasions between March and July, 2016. The contact occurred at times when the child was sitting on his lap while playing video games on his computer at his home. The child was always fully clothed, and all contact was through her clothing except for one occasion when the defendant slid his hand under her underwear and applied K-Y Jelly to her outer genital area. There is no evidence that he ever penetrated her vagina. On this last occasion, the child protested and there was no further contact. Several weeks later the child told her parents what had happened. The parents contacted law enforcement. When confronted, the defendant admitted what he had done and was fully cooperative.

**ISSUES ON APPEAL**

1. The court abused its discretion, under the circumstances of this case, by denying the defendant's request for probation and by sentencing him to an aggregate term of fifteen (15) years, the first four (4) years of which is fixed and the remaining eleven (11) years is indeterminate.

2. The court abused its discretion in denying the defendant's motion for reduction of sentence under Criminal Rule 35.

## ATTORNEY FEES ON APPEAL

The defendant is not seeking to recover costs or attorney's fees on appeal.

## ARGUMENT

At sentencing, the Court addressed the four factors mandated by law, namely: protection of society, deterrence, rehabilitation and retribution. Our Supreme Court and our Court of Appeals have stated that:

“A term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all other related goals of deterrence, rehabilitation or retribution applicable to a given case. A sentence of confinement longer than necessary for these purposes is unreasonable.” *State v. Toohill*, 103 Idaho 565 at 568, 650 P.2d 707

“Moreover, it is clear, as a matter of policy in Idaho, that the primary consideration is ‘the good order and protection of society.’ All other factors must be subservient to that end. *State v. Moore*, 78 Idaho at 363, 304 P.2d at 1103.

In addition, I.C. § 19-2521 mandates probation unless “imprisonment is appropriate for protection of the public because of the listed reasons. (Emphasis added).

For the reasons set forth below, it is submitted that the sentence handed down by this Court is unreasonable considering the above-stated criteria, and the facts of this case. The court intentionally placed other factors above the good order and protection of society by sentencing the defendant to a fixed term of imprisonment and in denying his Rule 35 request for modification of that sentence.

### (a) Protection of Society.

All other criteria must be subordinate to this goal. Clearly, however, in this case, there is no need for the defendant to serve any additional time in custody for this goal to

be achieved.

In his psychosexual evaluation of the defendant, included in the PSI at pages 34-48, Dr. Sombke found that the defendant possessed a “very low level of psychopathy” with a score of 1 out of a possible 40 on the PCL-R. “PSI, p. 41, L. 1-10” He also scored 2 out of a possible 40 on the HCR-20 scale, leading Dr. Sombke to conclude he would be a “Low risk to engage in future general violence” and “a Low risk to engage in future sexual violence.” PSI. p.41, L. 11- p. 42, L. 5.”

On the Static-99R test, Mr. Cruse scored a -1 out of a possible 12, placing him in “the Low level of risk category for being charged or convicted for another sexual offense.” PSI. p. 42, L. 15-17. In addition, Mr. Cruse scored only 3 out of a possible 26 points on the Stable 2007 test, making him a “Low risk to be charged or convicted of future unlawful sexual behavior.” PSI. p. 41, L. 26-33. Please see Dr. Sombke’s summary of Mr. Cruse’s Risk Level on page 46 of the PSI.

He also believes that Mr. Cruse is “highly amenable for treatment at this time” as he wants the best sex offender treatment he can find so that this never happens again.” PSI, p. 46, L. 41-43. Dr. Sombke’s recommendations are all geared toward treatment and probation. PSI. p. 46-48.

His LSI-R score was 10, which placed him in the low risk category for recidivism. R. p. 49.

Ellen Hanegan, who divorced the defendant over this matter, very strongly declared that Mr. Cruse is very low risk and that he would never be back in court again as an offender – ever. She based her opinion on the defendant’s age (almost 60), the fact that this was his first offense ever of any kind, and her knowledge of him. Her assessment of his risk of reoffending is highly valuable, not only because she knows him better than anyone else, but also because of her many years of training and experience in this very field in the State of Washington. She served on the Indeterminant Sentencing Review Board for the State of Washington for 10 years. R. p. 79 L. 16-22. A copy of her letter is

included as an attachment to the PSI and as Exhibit A to the Memorandum in Support of the defendant's Rule 35 motion. R. p. 78-81.

She stated that if the defendant had committed this offense in Washington, he would have been offered a "Special Sex Offender Sentencing Alternative", consisting of 6 months in jail, followed by 5 years of closely supervised probation. R. p. 79, L. 23-29.

Attached to the PSI are numerous letters of support from family and friends attesting to his strong Christian faith, his talents and abilities, his honorable military service, his success in business, and his over-all integrity. They all feel this is a one-time mistake that should be easily rectified. PSI p. 51-62.

The Presentence Investigator recommended a Rider. PSI p. 17, L. 13-17

In sum, no one thinks Mr. Cruse is a risk to reoffend or that society needs anything more than probation and sex offender registration to be adequately protected from him.

**(b) Deterrence.**

From the very first moment Mr. Cruse was confronted about his actions, he was open and honest about what he did, and was extremely remorseful. PSI. p. 75, L 4-12, 31-41, p. 76, L 39-42. He cooperated with the investigation and for a long time elected to represent himself – the better to hurry the process, be convicted and face his punishment. PSI. p. 76, L 43-44; Tr. V. 1, p. 5, L 21-25; p. 6, L 1-17; p. 7, L 14-19; TR. V. 2, p. 9, L. 10 through p 18, L. 23. As he stated to Dr. Sombke, he wants to be sure that nothing like this could happen again. He needs nothing else to deter him from committing any future acts like this, and spending years in prison will not add anything to this factor.

When he is released from confinement he will be on a long-term probation and will be required to register as a sex-offender for the remainder of his life.

**(c) Rehabilitation.**

According to Dr. Sombke, Mr. Cruse is highly amenable to treatment, and is actively seeking “sexual offender specific treatment.” PSI p. 47, L 3-5. He also needs some treatment for drug and alcohol abuse and will have to remain drug and alcohol free in order to succeed on probation. See GAIN-I, PSI p. 29, L. 12-28. He has made it clear from the beginning that he wants treatment.

During his confinement in jail he has read and partially completed a workbook titled: *Facing the Shadow – Starting Sexual and Relationship Recovery*” and “*Shadows of the Cross – A Christian Companion to Facing the Shadows.*” (Both of these are designed for use in a group setting or with the assistance of a counselor, so he could not fully complete them). R. p. 69, p. 19-23.

He has also read numerous books and articles, including Gary Wilson’s book: *Your Brain on Porn*, Commonwealth Publishing, 2014.

He is actively seeking treatment and if granted probation will enroll in and complete whatever programs are available to him through his probation officer and will pay for them himself.

One program that is available at several locations in Idaho, including Meridian, is H & H Treatment Programs. It is sex offender specific and works closely with the Idaho Department of Probation and Parole. It is affordable and well suited to Mr. Cruse’s needs. The program is also available in Oregon should Mr. Cruse seek to transfer his probation to be near his family. R. p. 82-86.

Further post-release accountability is available to him through the “Covenant Eyes” program mentioned in Ellen Hanegan’s letter. It is an application that monitors every website a person visits and requires the consent of another person (presumably a probation officer) for entry if the website is considered inappropriate. The State of Washington uses this program to monitor sex offenders. R. p. 70, L. 1-16.



Obviously, treatment is also available through the Idaho Department of Corrections if Mr. Cruse were to be given a rider.

All of the above treatment avenues are available short of commitment to prison, and imprisonment does nothing to advance the goal of rehabilitation.

**(d) Retribution/Punishment.**

The Court's sentence in this case appears to have been focused primarily on punishment through a prison sentence. The court acknowledged that the defendant was a low risk to reoffend and highly amenable to treatment. The Court then stated:

All this tends to suggest that the defendant is perhaps not a profound risk to do this kind of thing again in the community.

So that may suggest that *protection to the public, detouring (sic) the defendant, et cetera, are not the factors that rise to the top of the list to consider in this case.* (emphasis added) As the defendant, if Dr. Sombke is correct, is not a high risk to re-offend, is indeed a low risk to re-offend.

And certainly it is true that the defendant has spent a couple of 100 days in custody so far. He is (sic) undoubtedly lost most of what he cared about in life as a result of this case, so is the defendant deterred? He may well be deterred by what has already happened to him, let alone what there is to come. Tr. V. 2, p 49, L. 8-23

For the reasons set forth below, it is submitted that the sentence imposed amounts to an abuse of the Court's discretion in this regard.

The criminal acts for which the defendant plead guilty consisted of 4 or 5 times in which he rubbed the victim's crotch over her clothes, only one time touching her skin under her clothes. When the victim complained, he stopped immediately and never did it again. There was no penetration. His remorse was immediate and overwhelming, and persists to this day.

On each occasion, he was to some extent under the influence of marijuana and/or alcohol, so his inhibitions were lowered. PSI. p. 38, L. 17-18

As has been pointed out he has accepted full responsibility and has been fully cooperative with the legal process. He is a Navy veteran who honorably served his country, and this is his first criminal offense of any kind. Tr. V. 1, p. 16, L 1-9.

He has already suffered enormous punishment through the shame and guilt he faces daily, the loss of his reputation, the loss of his home, the loss of his wife and her family. He has lost his existing business in the aerospace industry. His position involved serving as an auditor for the ANSI-ASQ National Accreditation Board (ANAB), which is the largest aerospace accreditation body in the world. He is currently certified as an Aerospace Quality Management System Auditor and an Aerospace Accreditation Assessor. His current certifications expire in July of 2018. If they expire, he will have to start all over to have any productive employment in the aerospace industry. He will no longer be able to travel internationally because of the felony conviction. The financial loss to him alone exceeds \$100,000 per year. R. p. 71, L. 11-20.

In short, if he is confined to prison for the fixed term given by the Court, a productive, useful member of society will essentially become unemployable.

Society gets no benefit from this prison sentence. According to the IDOC website and information provided by the Inmate Placement Supervisor for the Department of Corrections, the Idaho prisons are already over 100% of capacity for minimum and medium security prisoners. R. p. 87. More than 600 prisoners are currently being housed in county jails because no beds are available at the State institutions. R. p. 88. According to the chart provided on page 88, the forecast is for increasing overflow to county jails.

According to calculations submitted by the IDOC Budget and Payroll department, and included in the IDOC Report to the Legislature dated February 1, 2017, the average cost to the State of Idaho to incarcerate an offender at an IDOC facility is \$61 per day. R. p. 95, L. 6. For the remainder of Mr. Cruse's fixed term the cost will be in excess of \$72,000. When one factors in the loss to the State of income taxes that would have been paid by Mr. Cruse during that time period, the cost probably exceeds \$100,000.

That same report indicates that the cost of supervision for a probationer is \$4.25 per day. R. p. 98, L. 8-10. The public suffers when a prisoner who should be on probation is instead incarcerated.

Society suffers loss when a useful, productive member of society is locked up for years, being exposed daily to the criminal population, while his skills and employability evaporate.

Upon release from confinement, he will be subject to sex-offender registration the rest of his life - which is no small punishment.

Mr. Cruse is paying an enormous price for his crime without the need for further confinement.

**Concerns Expressed by the Court:**

Of concern to the Court at sentencing were various statements made by the defendant:

(1) Absence of sex in his marriage.

The Court stated this situation would not explain why Mr. Cruse might be interested in children. In fact, there is no direct connection between the absence of sex in his marriage and an interest in children. The absence of sex in his marriage was simply a factor leading him to view Internet pornography and masturbate as a substitute for a normal and healthy sexual relationship in his marriage.

(2) The defendant thought the child enjoyed what he did to her.

The Court correctly noted that a 7-year old child is not capable of consenting to any kind of sexual activity.

The importance of the defendant's statement is that he never intended any physical harm to the child and would have been mortified to think he was inflicting harm to her. He is not a violent sexual predator and no violence was used or intended.

Probably one of the delusions associated with child pornography is that the victim derives some pleasure from the process. That notion is obviously incorrect, but it can

surely be dealt with in a treatment program. After all, the purpose of treatment programs is to expose delusional thinking and replace it with truth.

(3) The defendant believes the offense was the product of a sexual addiction brought on by viewing Internet pornography.

In addressing the factor of rehabilitation, the Court stated the following:

Now, another thing that's of concern to me and that is – that appears repeatedly throughout the presentence investigation and in any number of letters is that this behavior is the product of a sexual addiction brought on by viewing Internet pornography.

Internet pornography has become I think in today's day and age pretty pervasive, and the notion that a person starts on a course of watching adult pornography and watches adult pornography on a regular or increasing basis, that that somehow causes that person to develop a sexual interest in children I think is extremely naïve. I don't think that is supportable at all.

The defendant on some level has – must have a sexual interest in children to have done what he did, and I don't think there's any way of saying that reasonably laying that at the feet of watching adult pornography.

So I think there are a lot of folks in Mr. Cruse's life who are looking at the wrong place in finding the genesis of this behavior, the reason Mr. Cruse came to do it. And I'm concerned that Mr. Cruse, to the extent he is trying to convince himself of that explanation as well, is going to be tougher to rehabilitate than he might appear.

Because I don't think it is as simple as saying, Well, I started looking at pornography on the Internet, and that led me as if it were almost inevitable to wanting to engage a seven-year-old girl in sexual behavior. Those events cannot reasonably be linked in that way. Tr. Vol. 2, p.54, L. 5 – p. 55, L.13

As was pointed out in the memorandum in support of Mr. Cruse's Rule 35 Motion, in fact, many studies suggest that the process is progressive in certain ways. Gary Wilson, in his book *"Your Brain on Porn"* (Commonwealth Publishing, 2014)\* states the following:

At first, using porn and masturbating to orgasm resolves sexual tension and registers as satisfying. But if you chronically over-stimulate yourself, your brain may start to work against you. It protects itself against excessive stimulation by reducing dopamine signaling, and you feel less gratified....the brain accomplishes this by reducing dopamine receptors and releasing less dopamine, pushing some users into an even more

determined search for stimulation. These physical brain changes lead to desensitization, which drives the need for greater stimulation (tolerance). (P. 66)

He further states on pages 60-62:

“Dopamine surges for novelty...As with everything new the thrill fades away as dopamine plummets....Internet porn is enticing to the reward circuitry because novelty is always just a click away. It could be a novel mate, unusual scene, strange sexual act, or – you fill in the blank.”

“Dopamine fires up for other emotions and stimuli too, all of which often feature prominently in internet porn:

- Surprise/Shock

- Anxiety

- Seeking and searching R. p. 73, L. 16 – p. 74, L. 10

Because the stimulation initially provided by viewing adult pornography gradually abates, in order to achieve the desired level of dopamine necessary for sexual stimulation the viewer must move on to other types of stimuli – which may include child porn.

Mr. Cruse reported to Dr. Sombke that he had been viewing Internet pornography on a daily basis and he would only look at adult images of sexual behavior. However, he stated that over time his pornography viewing involved younger and younger females and in 2012 or 2013 he stumbled upon a naked picture of a young girl at a nudist colony. He stated that image stoked an interest in him and he started searching out more naked pictures of young girls. PSI, p. 39, L. 1-8

In *Internet Pornography and Paedophilia (2013)\*\** Dr. Heather Wood, a clinical psychologist, delved into the reasons for the impact that internet sex has on the person viewing it, and why they might find themselves regressing from adult pornography to child pornography.

Her studies indicate “that the Internet is not simply drawing attention to those with existing paedophilic interests, but is contributing to the crystallization of those interests in people with no explicit prior sexual interest in children.” R. p. 109, L. 6-11.

She argues that “Internet sex in some way facilitates or engenders a sexual interest in children, and does not just reveal existing sexual interests, but actually contributes to the crystallization or emergence of such interests.” R. p. 110, L. 41-44. Her article (R. p. 109 – 128) cites studies in support of that point of view (see R. p. 110-111), and offers some possible reasons for the phenomenon.

This argument is also supported by certain findings of a survey of child pornography offenders conducted in New Zealand in 2013. The results were summarized in a paper entitled *“So Why Did You Do It”: Explanations Provided by Child Pornography Offenders* published in Sexual Offender Treatment, Volume 8 (2013), Issue 1. R. p. 129 - 145

On page 136, L. 1-9, we find the following:

**“Progression from Legal Material:** For nine participants, their CP offending appeared to be the result of prolonged exposure and potential desensitization to legal pornography. Some participants provided fairly detailed responses of their journey:

‘The gradual escalation from normal adult material to more extreme material (dehumanizing) after first accessing the Internet, that I used it to cope with emotional and stressful situations. Followed by viewing younger and younger women, girls and preteen, i.e. child modeling [sic] and cartoons showing extreme adult and other abusive subject matter. (Case 5164)’

Again, some of the responses clearly linked back to a developing sexual interest in children, based on increasing exposure to the material.”

The relevance of this evidence is that Mr. Cruse’s explanation is supported by science and is not just a lame excuse to mask responsibility for his pedophilia. The link between viewing Internet porn and viewing child porn is valid, and the resulting conditions would appear to be treatable.

When presented with this information in the Rule 35 motion, the Court should have at least acknowledged that the defendant’s explanation was supported by studies and the experiences of others, and should have granted the requested relief.

### **The Sentence is Excessive Compared to Others**

In addition to the foregoing matters, the Idaho Sentencing Information Database Query attached to the Presentence Report (R. p. 50) indicates that in the past five years, 19 men within 5 years of the age of Mr. Cruse were sentenced for the same crime. These men fell into all ranges of risk factors, prior convictions and of drug and alcohol problems. Presumably some of them had prior convictions and some scored higher on the risk factors, and presumably some of their actions were more egregious than those of Mr. Cruse.

Of those 19 men, 3 were granted probation for terms ranging between 3 and 20 years, 3 were given riders with median underlying sentences ranging from 2 years to 8 years, and 13 were sentenced to prison. The median prison term for those men was 5 years.

According to Mrs. Hanegan, had this offense occurred in Washington, Mr. Cruse would probably have been given 6 months in jail and 5 years of probation.

### **Summary**

The court erred in refusing to grant Mr. Cruse's request for probation. I. C. § 19-2521 mandates probation unless "imprisonment is appropriate for the protection of the public."

"Moreover, it is clear, as a matter of policy in Idaho, that the primary consideration is 'the good order and protection of society.' All other factors must be subservient to that end. *State v. Moore*, 78 Idaho at 363, 304 P.2d at 1103.

The court's own statements specifically acknowledged that society does not need protection from Mr. Cruse and that he does not need punishment for deterrence. It also acknowledged that he can be rehabilitated. It erred by placing the element of retribution

above the element of protection of the public, as required by statutory and case law in Idaho.

The primary goal of protection of society does not require prison at all. The sentence of 4 years fixed plus 11 years indeterminate is purely for punishment and it is excessive under these circumstances.

At the time of this writing, Mr. Cruse remains in the Valley County Jail where he has been for 420 days. The prison is full and it is unlikely that he will be transported to the penitentiary for another year or two. The Valley County Jail is not meant for long-term confinement and has no programming of any kind. Continued confinement in these circumstances is unreasonable and cruel.

**Conclusion:**

For the foregoing reasons, the defendant urges this Court to reduce the sentence in this matter to eliminate and fixed time and to place the defendant on probation.

Respectfully submitted.

/s/ Michael G. Pierce  
**Michael G. Pierce**  
Attorney for Defendant

August 29, 2017  
**Date**



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that I have this 29th day of August, 2017, caused two (2) paper copies and an electronic copy of the foregoing document to be served upon:

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Attorney General for the State of Idaho  
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/s/ Michael G. Pierce  
Michael G. Pierce